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NATIONAL DEFENSE—CONSTITUTIONALITY OF PENDING LEGISLATION.

The problem of national defense always has been a question over which both individuals and political parties have widely differed. We need but to refer to the debates in the Constitutional Convention, and to the discussion concerning the adoption of the Constitution, to learn the wide variation in points of view that prevailed even at this early stage in the history of the nation.

There have always been on the one hand, those who believe in preparation for war at least to some degree, and, on the other hand, those who believe any preparation to be both unwise and unnecessary—unwise because it tends to bring what it is designed to prevent, unnecessary because the last war has been fought. Fortunately the latter class seldom have been charged with the responsibilities of government. But among those who have always believed in some degree of preparedness the difference of opinions has been so great as outwardly to prevent this nation from becoming imbued with a “spirit of militarism”, but to keep it in a continual state of unpreparedness either to enforce its rights, defend its policies, or protect its citizens and other interests. When military action has become inevitable, therefore, it has been only with needless expense and wholly unnecessary sacrifice of life that the nation has been able to meet the situation.

At this time, when the problem has assumed an interest which is all important, and has reached a place in the public eye, probably never before attained, the question of defining the limits to which the country should go in preparing herself to meet the needs of a possible conflict must be met and answered by those entrusted with the reins of government in a way and with a degree of definiteness not heretofore necessary. It is the purpose of this discussion to consider some of the plans proposed and their possibilities and limitations under the system of government peculiar to this country with its legislative restrictions and constitutional inhibitions.

Few, indeed, realize the extent of our military needs. The

General Staff of the Army bases its recommendation of the number of first line troops needed upon the number of troops the great Powers can land on our coast in the event of the loss of the control of the sea. Germany, using one-half of her transportation, could embark and bring into our waters within fifteen days three hundred and eighty-seven thousand men, following this in forty-one days with over four hundred thousand more. France could land one hundred and sixty thousand in a first expedition, two hundred and forty-three thousand in a second. This does not take into consideration the possibility of combinations of Powers, with ourselves in isolation or "without entangling alliances". With this as a basis the War College report shows the necessity of over two hundred thousand trained troops with three hundred thousand trained men in reserve subject to call to meet a possible enemy. The recommendation of the Secretary of War is practically the same, except that it includes a proposed Continental Army in the first line of troops, whereas the War College does not.

It may be assumed safely for the purpose of the present discussion that not only the traditions but the whole spirit of our people is opposed to a large standing army equal to the reasonable military needs of the nation. On the other hand, there seems to be a substantial agreement among students of military affairs that the volunteer system has been a mistaken policy and that the American belief in its effectiveness is a dangerous national illusion.¹ If we are not to be dependent upon these, and no one who has thought upon the question at all believes that we should be, how then, in view of our traditions, are the military needs of the nation to be met?

There are several possible plans, all embodied in proposed legislation now pending before Congress: (1) An increase in the size of the regular standing army, sufficient to meet any possible demand. (2) An increase of first line troops by providing for one hundred and fifty thousand to two hundred thousand men

¹ See *Addresses on Preparedness*, General Leonard Wood (Princeton Press).

in the regular army with three hundred thousand to three hundred and fifty thousand trained men in reserve subject to call.

(3) A trained citizen army under federal control. (4) A modified form of conscription or universal service in a system of universal training. (5) The improvement of the National Guard, with pay to the officers and men having "federal status".

1. Of these plans the first may as well be dismissed for the present as our people are opposed to it. It violates our traditions, arouses the opposition of large classes of society, and places on the nation an economic burden it is not inclined to assume.

2. The second proposition involves the real problem. Some increase is demanded and unless a reserve is fully provided for, any likely increase in enlisted strength will be wholly inadequate. The difficulty arises in the question of how this reserved strength is to be obtained under the restrictions placed by the Constitution upon the powers of Congress in this respect.

3. The War Department Army Bill submitted to Congress for criticism embodies the third plan under the name of the Continental Army.² This plan has been vigorously attacked both by those who believe it concentrates too much power in the federal government and by those who believe it to be wholly inadequate. It provides for the raising of four hundred thousand men in three annual contingents thereafter to be maintained at four hundred thousand.

There is but one serious constitutional obstruction that might lie in the path of this scheme. The act provides that the officers are to be commissioned by the President, but later provides that in the event of war only, shall the President be authorized to call out the Continental Army Reserves and to employ them as he may deem best.³ It will be remembered that it was the distrust of the use of the army by the Executive that led the framers of the Constitution to lodge the authority to commission officers in the governors of the several states instead of in the President.⁴ Doubtless this action was based upon historic

² The Hay Army Reorganization Bill is substantially the same.

³ Section 33.

⁴ See "Federalist", Arts. 28 and 29.

grounds, for in the contest between King Charles and the Tory Parliament an act was passed providing that for the time being the officers of the militia should be appointed by Parliament, upon the theory that the control of military forces could never be wholly divorced from the power to commission officers. But with the power to declare war lodged in Congress, section thirty-three would seem to meet that objection.

The act also provides for a period of training not exceeding three months in any one year or an aggregate of six months in the first three years of enlistment, the scheme contemplating two months' training for each of the three years' enlistment. Many believe that no volunteer scheme of enlistment would keep up such a force, that the two months a year plan would unduly interfere with industry, and that it would so interfere with the National Guard that neither of them would be successful.

4. Conscription or universal service would, of course, meet the military needs of the country, and with universal service any of the plans suggested could be made fully effective or the National Guard could be made to answer the problem. But the country is not ready for it. There is, however, a growing sentiment for universal *military training*, and if the War Department fails to get its Continental Army plan passed, this fourth proposition may receive considerable consideration.

A bill has been introduced in Congress embodying a plan for an Americanized Swiss system providing for universal military training.⁵ It provides for the training of all citizens of twelve to twenty-three years of age inclusive, the persons so trained between the ages of twelve and seventeen to be grouped in the Citizen Cadet Corps, while those between the ages of eighteen and twenty-three, to be grouped in the Citizen Army or the Citizen Navy. The training for both the Citizen Cadet Corps and the Citizen Army and Citizen Navy is to be given in public and private schools, academies, colleges, and universities, in the Organized Militia or Naval Militia of the several states, or in organizations of Boy Scouts or similar organizations. Upon reaching

⁵S. B. 1695, introduced by Senator Chamberlain.

the age of twenty-four years all such persons become members of the Citizen Army Reserve without further training. The President is empowered to commission and appoint officers, giving recognition to graduates of military colleges and to militia officers. The members of the Cadet Corps and of the Citizen Army are to have no pay but are to be allowed transportation, subsistence, and medical attendance. A Citizen Army Division of the General Staff is provided for and fifty inspection districts with army officers in each are established.

Some doubt has been expressed as to whether under the Constitution the federal government has authority to enforce universal training. It is not believed this doubt is well founded. The Constitution of the United States provides that Congress shall have power to provide for the common defense and general welfare of the United States.⁶ Certainly in the Draft Act of March 3, 1863, Congress applied to the citizens generally the principles of universal liability to military service. It has been said in this connection in reference to this particular constitutional provision, "The authority was magnified and gave every war power that the most despotic ruler could ask,"⁷ and it is the opinion of many who have studied the question from this point of view that this is not beyond the power of Congress. Former Secretary of War Stimson and Judge Advocate General Crowder of the Army have recently discussed the matter and are in accord in believing the power to exist,⁸ an opinion with which the Secretary of War apparently concurs.

5. The fifth proposition, which involves the improvement of the National Guard and the providing of pay to officers and men having "federal status", has been put forward by many as the remedy best fitted to meet the existing military needs of the nation. Whether this be true or not, this plan is certain to meet with the most constitutional difficulties.

While most students of the subject believe that no scheme short of universal service, and probably not even that, should

⁶ Art. I, Sec. 8.

⁷ Upton: *Military Policy*, Vol. I, p. 74.

⁸ See *Army and Navy Journal*, Vol. LIII. p. 636, No. 2734.

ignore the possibilities of the National Guard if properly strengthened and made subject to the federal government in time of need, the serious question to be determined is whether the National Guard can be subjected to the federal government. If it has to remain under the divided control of the governors of the respective states and only available as a *volunteer* force in case of war, it in no sense meets the need, and should be ignored in plans for national defense, though of course remaining a great internal asset.

The question arose at the last session of Congress under sections thirty-eight and thirty-eight *a* of the then pending Militia Pay Bill,⁹ which bill is also under discussion in Congress now, as to whether these sections were effective or could be made effective, to give the enlisted men of the National Guard the status of enlisted men of the Army of the United States and make them available for "any duty for which the regular Army may be employed". Under that portion of the Constitution of the United States which provides that Congress shall have power "to raise and support armies"¹⁰ some authority may be found to support such legislation. It would seem that Congress would have power to provide a means, lawful to that end, whereby in case of war or when war is imminent, and armies in excess of the regular army may be needed, the members of the militia, actively serving therein and practically members of the army by virtue of an oath theretofore taken to serve the United States, might be ordered out by the President in case of war.

The first question which arises is whether a citizen can be both a member of the militia and also a member of the army subject to call by the President. During the War with Spain members of the militia were also members of the volunteer forces, though of course not actively in both capacities, being first militia and then volunteers.¹¹ When a man enlists in the organized militia a contract is signed by which his status is changed from that of

⁹ 163rd Congress S. 6217, introduced by Senator Chamberlain.

¹⁰ Art. I, Sec. 9.

¹¹ *Kneedler v. Lane*, 45 Pa. 238 (1863).

a private citizen to that of a soldier, that is, he assumes a military status.¹² Is he renouncing this obligation to the state to serve it as a duly enlisted member of its militia and assuming another and different, an inconsistent, obligation, by entering into a contract also with the United States, by signing another agreement constituting virtually an enrollment in the army, when he agrees to become, *in futuro* a member of the army when called by the President with the consent of Congress? It would seem not. He might serve out his complete enlistment for he is not to serve in the army until Congress acts and Congress may not act during the term.

But Congress has power not only to raise armies but to provide for "organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."¹³ May it not so exercise its power over the militia as to facilitate the use of its power to raise armies by providing that those members of the militia who have agreed in advance by oath to serve the United States when called may be transferred to the army when Congress does act? Such a plan of organization might interfere with state control to be sure, but "organizing" is one of the powers of Congress, which power is plenary and all state laws inconsistent therewith are null and void.¹⁴

An army by this plan is raised by so organizing the militia that in case of need, by virtue of a dual enlistment, it becomes an army in fact. If the means here used to raise armies is legitimate and the end is within the Constitution, then means adequate to attain those ends must be legitimate and constitutional.

The bill also provides that no benefit of the act shall extend to a member of the militia "who has not voluntarily subscribed an agreement or taken an oath as a commissioned officer, or en-

¹² In re Grimley, 137 U. S. 147 (1890).

¹³ Art. I, Sec. 8.

¹⁴ Opinion of the Justices, 14 Gray 614 (Mass. 1860).

listed man in the army of the United States," but that such agreement and oath "shall be effective to create the status of officer and enlisted man in the army of the United States." The act further provides that such member shall not be entitled to the pay and emoluments of the army except as provided in the act until ordered out by Congress.

If he is not entitled to the emoluments, will he be subject to the Articles of War and rules of the War Department for the violation of which he would, as a member of the army, be subject to court martial and punishment? If so, he would thereby be subject to three jurisdictions—the army, the state militia, and the state civil. He would as a militiaman be subject to both state civil and military. That is inevitable.¹⁵

It would seem, however, that the provision as to pay contemplates that such men shall not be subject to army discipline until called into active service by Congress. If the jurisdiction of the state has not been lost or that of the United States been assumed, how are the militiamen who sign such an agreement to be classified? Can they be called "volunteers"?

The term "voluntary army" comprehensively means a temporary military organization which the government employs on voluntary service in time of war or other public danger. It is made up of: (1) Persons who voluntarily make their engagements directly with the United States to serve; (2) Persons who are conscripted directly by the United States and forced to serve; (3) Persons who voluntarily engage with a state to serve in a state militia organization, and are, together with that organization, called into the United States service as State Militia by the President; (4) Persons who are drafted by a state and forced into a state militia organization, and are, together with that organization, called into the United States service as State Militia by the President.¹⁶

Those who make volunteer engagements directly with the United States to serve and those conscripted directly by the

¹⁵ Willoughby: Constitution, p. 1195.

¹⁶ Howland's Digest Opinions Judge Advocate General of the Army, p. 1038.

United States and forced to serve constitute organizations which, as well as the regular army, are called into existence by Congress under its constitutional power "to raise and support armies."¹⁷ The state organizations are made part of the army under another provision of the Constitution which gives Congress the power "to provide for organizing, arming, and disciplining the militia". They retain their character of state militia, and are considered as belonging to the "Volunteer Army" notwithstanding the fact that the men may have been conscripted.¹⁸ After members of the militia are in the service of the United States no distinction between them is made because of the method pursued by the state in securing them, whether by voluntary enlistment or by conscription. All are designated as militia called into the service of the United States.¹⁹

It would seem therefore that men signing the agreement and taking the oath provided by the act to make them subject to call by Congress would be classed as "volunteers". If they are "volunteers" is it necessary according to law that they be "mustered in" by a commissioned officer of the army before they can be regarded as "accepted" or received into the military service of the United States?²⁰ If the man is not in the army by reason of *agreement* to serve, then the government must rely upon the "muster in" to put him in service. If that is the case, the militiaman may or may not present himself for muster, as he pleases. If he does not, he is not subject to the rules of war but subjects himself only to the penalty prescribed by law which is not effective.

It is essential if the government is to include the National Guard in the first line troops or as part of an adequate reserve that it should have power to order them out under the law without the necessity of any further action upon the part of the men to subject themselves to the Articles of War and the army juris-

¹⁷ Howland's Dig. Op. J. A. G. of the Army, p. 1030.

¹⁸ Strictly speaking the conscription volunteer is not a volunteer at all. Conscription in reality is opposed to the volunteer system.

¹⁹ Howland's Dig. Op. J. A. G. of the Army, p. 1039.

²⁰ 23 Op. Attorney General U. S. 408.

diction. To gain this end the power must exist by virtue of the power to raise armies; if the act must be based on the power over the militia, it becomes ineffective. The problem for the framers of the bill is to make sure that each section can be made both constitutional and effective. Otherwise the federal control of the militia ceases and reliance for the early stages of a conflict, at least, must be placed in one of the other plans proposed.

Universal military training as outlined above is the only really democratic and adequate solution of the problem of national defense. Whether that is adequate or not the state militia, *if it can be made subject to federal control*, is the plan most likely to produce immediate results. If universal training is not adopted and it seems unlikely that the nation will adopt it at this time, then the National Guard is by far the most effective force available when properly disciplined, trained, and subject to federal call. It is essential therefore to know exactly what are the constitutional questions involved in attempting to create the status of a United States soldier at the same time that men enlist in the state militia.

(To be continued.)

Nathan William MacChesney.

Chicago.